

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PEOPLES HERITAGE BANK, and)	
APEX, INC.,)	
Plaintiffs)	
v.)	Civil No. 95-0180-B
MAINE PUBLIC SERVICE COMPANY,)	
Defendant)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

This is an action arising out of costs incurred by Plaintiffs in remediating environmental contamination at property they allege was contaminated by Defendant's electrical transformers. The matter came before the Court for bench trial beginning on July 22, 1996. Following trial, the parties were directed to submit proposed findings and conclusions for the Court's review, and those materials have been submitted. Based upon a review of the proposed findings and conclusions, as well as the evidence presented at trial, the Court hereby enters the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. In September, 1992, the Asset Management Department of Peoples Heritage Bank ["PEOPLES"] purchased the Mitchell Trucking property in Presque Isle, Maine ["THE SITE"] at a foreclosure auction. Peoples' bid was assigned to APEX, Inc. ["APEX"], a subsidiary of Peoples that holds, manages, and sells foreclosed properties.

¹ Pursuant to Federal Rule of Civil Procedure 73(b), the parties have consented to allow the United States Magistrate Judge to conduct any and all proceedings in this matter.

2. Maine Public Service Company ["MPSC"] is an electric utility located in Presque Isle, Maine, which provided electrical service to the Site from 1956 to the present.

3. In October, 1992, County Environmental Engineering ["CEE"] began a Department of Environmental Protection ["DEP"] site assessment at the Site. During the assessment, CEE's excavator bucket hit cedar log cribbing material about two feet below the surface. Inside the crib was two feet of watery substance on top of two feet of a white pasty substance.

4. As directed by DEP, CEE placed the material in a dumpster located east of the crib. Some of the material spilled as it was put into the dumpster.

5. Samples taken of the soil around the area were tested, and found to be contaminated with polychlorinated biphenyls ["PCBs"] at 330 parts per million.

6. Higher concentrations (as high as 1800 parts per million) of PCBs were found in other locations at the Site.

7. There are different types of PCBs, which are identified by a number called an "Aroclor." The soil samples at the Site contained only Aroclor 1248.

8. Since 1956, MPSC has had at least six distribution transformers located at the Site. One of those transformers has been shown to contain Aroclor 1248 at concentrations perhaps as high as 7.5 parts per million.

9. Since 1956, the Site has been used by several manufacturing concerns. Plaintiff's expert concedes, while believing the transformers contaminated the Site, that there are other possibilities arising from these earlier uses of the Site.

10. From 1956 to as late as 1964, Shalek Bag Company operated a facility for the manufacture of burlap and paper bags on the Site. The manufacturing process involved the use of

inks, dyes and solvents, at least one of which is unidentified. The solvents were used to wash inks and dyes from print rolls at a sink that drained into a cesspool located at the approximate location of the crib.

11. Maine Potato Growers purchased the Site in 1965. From 1975 to 1980, the Site was leased to Converse Rubber Company. Converse used the facility for the process of stitching canvas uppers to the rubber soles of shoes.

12. The Site was sold to Mitchell Trucking Company in 1984, following which four underground storage tanks were installed on the Site, one for kerosene, one for diesel fuel, and two for No. 2 fuel oil. DEP records indicate a spill from one of No. 2 fuel tanks in 1984.

13. Also in 1984, the utility poles were relocated and fill from an unknown source was brought to the Site as part of a landscaping project.

Conclusions of Law

1. Defendant concedes that Plaintiffs are entitled to the security interest exception to liability under the Comprehensive Environmental Response, Compensation, and Liability Act ["CERCLA"], 42 U.S.C. §§ 9601-9675. *See Northeast Doran v. Key Bank of Maine*, 15 F.3d 1, 2-3 (1st Cir. 1994). Accordingly, Plaintiff's claim in Count II for contribution under section 113 of CERCLA, 42 U.S.C. § 9613, is hereby DISMISSED. *See United Tech. v. Browning-Ferris Ind.*, 33 F.3d 96, 103 (1st Cir. 1994).

2. Defendant concedes that it's transformers are "facilities" under CERCLA, and that it is therefore a "covered person" within the meaning of CERCLA, inasmuch as it is an owner operator of a facility on the Site. 42 U.S.C. § 9607.

3. Defendant concedes Plaintiffs have incurred necessary costs of response in remediation of the contamination found at the Site. 42 U.S.C. §§ 9601(25), 9607(a)(4)(B).

4. The Court finds that Plaintiffs have failed to prove by a preponderance of the evidence that there was a "release of a hazardous substance from" the distribution transformers located on the Site and owned by Defendant. 42 U.S.C. § 9607(a); *Dedham Water v. Cumberland Farms Dairy*, 889 F.2d 1146, 1151 (1st Cir. 1989). Plaintiffs ask the Court to infer that the transformers must have been the source of the contamination on the basis of one expert's opinion that none of the other uses of the Site could have released Aroclor 1248. However, there were unidentified materials (including the fill used by Mitchell Trucking and the cleaning solvent used by Shalek Bag Company) present on the Site. Further, there is an absence of evidence (1) that any of the transformers contained Aroclor 1248 in anything near the concentrations discovered on the Site, and (2) that any of the transformers ever spilled onto the Site. Finally, there was credible expert testimony that the other uses could have caused the contamination. On the record before it, the Court is simply unable to adopt the inference Plaintiffs propose. Accordingly, Judgment is appropriately entered for Defendant on Counts I and II of Plaintiffs' Complaint.

5. Plaintiffs dismissed their state law claims (Counts IV through VIII) with prejudice on July 24, 1996.

Conclusion

Accordingly, Judgment shall enter for Defendant as against Plaintiffs on all Counts of Plaintiffs' Complaint.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated at Bangor, Maine on December 2, 1996.